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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEREK PAUL SMYER et al., Defendants and Appellants.	B283604 (Los Angeles County Super. Ct. No. SA079068)

APPEAL from judgments of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed as modified.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant Derek Paul Smyer.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Skyler Moore.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller, and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Derek Paul Smyer and Skyler Jefferson Moore appeal from judgments which sentence them to state prison for the murder of Crystal T. and the fetus she was carrying. Smyer hired Moore to kill Crystal, who was pregnant with Smyer's child. Smyer contends reversal is required for insufficiency of the evidence, evidentiary errors, instructional errors, and prosecutorial misconduct. Moore joins in two of Smyer's evidentiary arguments, and contends his confession should not have been admitted. In supplemental briefing, the defendants also contend their constitutional rights were violated when the trial court imposed restitution fines without making a determination of their ability to pay. We find insufficient evidence supports the gun use enhancement on count 5 and modify the sentences on counts 4 and 5, but otherwise affirm the judgments.

FACTS

Smyer and Moore were tried in a joint trial in 2017 with separate juries. The prosecution presented evidence that Smyer solicited Moore to kill Crystal, who was pregnant with Smyer's child, because he did not want the added financial burden. Moore agreed to the scheme because he wanted to recruit Smyer into his gang. Crystal died from a gunshot wound to the back of her head on September 25, 2001. Neither Moore nor Smyer were tried in 2001 due to lack of evidence. The police continued their investigation and Moore confessed to the crime in 2011. Following Moore's confession, the police also discovered Smyer's ex-girlfriend had been attacked during both of her pregnancies. The defendants were convicted and sentenced in 2017.

The People presented evidence at trial as follows.

Smyer's Relationship with Crystal

In 2001, Crystal had a relationship with Smyer that lasted approximately one month. She met him at Anderson Park in April and they sometimes ate lunch together there. Crystal's coworkers, Deniece P. and Jana P., met Smyer through Crystal. Jana saw Smyer at Anderson Park approximately three times in 2001. In June, Crystal told her coworkers she was pregnant with Smyer's child.[1] She told them she wanted the baby.

On July 23, 2001, Crystal, who was no longer seeing Smyer, asked Jana to email Smyer to tell him about the pregnancy and ask if he had sickle cell anemia. Smyer called Jana, who put him on speaker phone while Crystal and two other coworkers listened. Smyer did not want Crystal to have the baby. He said this had happened to him in his last relationship, and he did not want it to happen again. He urged Jana to do whatever she could to convince Crystal to get rid of the baby, and said he would do whatever he could. Jana informed Smyer that Crystal was able and willing to care for the child and did not want money from him. Smyer asked her to keep him apprised of the situation. In August, Jana accompanied Crystal to an abortion clinic, but she did not have an abortion "because she was too far gone and she really wanted the baby."

Smyer subsequently met with Crystal at her apartment and they discussed the baby for several hours. In early September, Crystal told her sister Smyer did not want the baby and she was sad because of this. On September 11, Crystal and

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[1] A DNA test excluded Moore as the father of the fetus. It also found it was 224,000 times more likely that Smyer was the father than an unrelated man.

her sisters drove to Texas to visit their mother, who was ill. The day she arrived in Texas, Crystal's aunt overheard Crystal speaking on the phone with a man she called "D." Her aunt heard the caller yelling angrily over the phone. Her aunt heard Crystal tell "D" that she was not going to get rid of her baby, that "you can't threaten me," and that "you're not going to make me get rid of my baby." Her aunt told Crystal to hang up the phone and Crystal did.

An hour later, Crystal's aunt overheard a second, similar conversation between Crystal and "D." Crystal's aunt heard him say, "No bitch tells me what to do." At that point, Crystal's aunt told her to hang up. Crystal began to cry afterwards. The following day, Crystal's aunt took the phone away from Crystal when she heard the same man screaming at Crystal on the phone. She told him not to speak to Crystal that way and hung up the phone. Her aunt became worried about Crystal's relationship with this man. She hoped Crystal and her sister would move to Texas and showed them a house they could buy.

Smyer learned from Crystal's coworker that she planned to be back at work on September 24. On her first day back at work, Crystal received a call from Smyer. She became upset and cried afterwards.

Crystal's Murder

At 7:34 a.m. on September 25, 2001, Crystal was found dead in the lobby of her apartment building on Kornblum Avenue with a gunshot wound to her head. She was five months pregnant, and the fetus died when she did. The detective who responded to the call found Crystal lying over the doorway to the carport area with her purse strap over her shoulder, and her car keys and a remote in her hand. No blood was found on Crystal's

purse or car keys. He observed a water bottle and a photograph of her son near her body. A Hawaiian Punch can was found next to a white car in the parking area.

Crystal's sister, Michelle, lived in the same apartment building with her children and typically picked up Crystal's son to take him to school with her children between 6:00 and 6:30 a.m. The day before the shooting, Michelle observed a man wearing a hoodie and black paisley bandana on his head as she left with the children. Michelle spoke to him briefly, which raised her suspicions, and called Crystal to warn her to be careful. At trial, Michelle identified Moore as the man she saw that day.

C.H., who was 11 years old in 2001, was walking to school with her friends when they stopped to eavesdrop on an argument they heard coming from Crystal's building. C.H. heard a man and a woman yelling at each other and then a single gunshot. She then observed a man run out of the building past them. He jumped a fence, got into the passenger seat of a black car, and drove away. During her testimony, C.H. testified she could not remember much about the car besides its color. Later, she stated it was "like a little Trailblazer" or a Thunderbird.

On September 27, 2001, a police sketch artist drew a sketch of the man Michelle saw the day before the shooting. C.H. was shown the sketch made from Michelle's description and indicated she was satisfied the sketch resembled the man she saw after she made some changes to it. The jury was shown the sketch drawn by the artist compared with Moore's booking photograph.

Walter O. was Crystal's neighbor. On the morning of the shooting, he saw a man wearing a white hooded sweatshirt with a bandana around his forehead enter the alley adjacent to the apartment building. Ten minutes later, Walter heard what he

thought was a firecracker. Someone from the next building shouted that someone had been shot. Walter then saw the same man run away from the building. At trial, Walter identified Moore as the man he saw. Walter's white sedan was parked in the first spot next to the lobby in the building's parking area. Walter did not drink Hawaiian Punch and denied the can found next to his car was his.

Kenneth M. lived in the building next to Crystal's and observed a light-skinned African-American man in a black hoodie loitering at the corner across the street at 1:00 a.m. the night before the murder. Kenneth thought he looked suspicious and intended to approach him, but he walked away. At trial, Kenneth testified Moore was approximately the same height and had the same skin color as the man he saw that night in 2001. Another neighbor, who lived in the building next door, had a view of Crystal's carport. He heard a gunshot and saw someone run across the carport to a brick wall, and then climb over it and a wrought iron fence.

The Connection Between Smyer and Moore

After ascertaining Crystal's identity on the day of the shooting, Detective Robbie Williams and his partner drove to her workplace. Crystal's coworkers advised the detectives that she had been dating Smyer, who worked nearby. Smyer was initially the sole suspect. Detective Williams and his partner drove Crystal's coworkers to Smyers' workplace, but discovered he was not there. They then traveled to Anderson Park, where he often met Crystal for lunch. They spotted Smyer's Mustang in the parking lot and one of the coworkers pointed out Smyer, who was standing 20-25 feet away. Detective Williams noted the coworker was nervous. Smyer was in conversation with a black man,

whom Detective Williams later believed was Moore. Other people were also standing nearby.

Smyer was detained and questioned. His vehicle and his home were searched. The search revealed no evidence connecting Smyer to the shooting. However, a search of Smyer's computer revealed he looked at a chat room regarding pregnancy with the statement, "I just got some slut pregnant. Now bitch wants my money. What should I do?"

Although a Hawaiian Punch can was found at his home, it was not from the same lot as the can at the crime scene. An ATM receipt found in Smyer's belongings and ATM surveillance footage showed he withdrew $60 at a 7-Eleven store eight blocks from Crystal's building at 11:32 p.m. on September 24, 2001, the night before the murder.

Smyer was ruled out as the shooter because he was at work at the time of the murder. However, the police came to believe there was a second suspect because they received a tip that Crystal was killed by a gang member with the moniker, Little C-Styles. Anderson Park was claimed by the 190 East Coast Crips and Moore, a member of that gang, had the moniker Little C-Styles. Crystal's sister, Michelle, identified Moore in a photographic lineup as the man she saw in the stairwell. Detective Williams also identified Moore as the man he saw speaking to Smyer at Anderson Park on the day Crystal was shot. C.H. and Walter identified Moore from a photographic lineup.

Moore was interviewed about Crystal's murder in November 2001. The police informed him they believed someone hired him to murder Crystal. He denied knowing her or having anything to do with her murder. He acknowledged he saw police

activity at Crystal's apartment building the morning of the shooting as he walked his brothers and sisters to the nearby school at approximately 8:00 a.m.

Moore's apartment, located near Crystal's building, was searched. Police found several bandanas, one of which matched the witness' descriptions of the bandana worn by the suspect seen at the building. Police also found gang writings and an unfired lead-clad .38 caliber bullet. Crystal was killed by a copper-clad .38 bullet.

Moore was charged, but witnesses at the preliminary hearing were either reluctant to testify or evasive. Only C.H. positively identified Moore as the man she saw running from the building. Because the evidence against Moore was weak, the charges were dropped.

Moore's Confession

Ten years after the murder, in 2011, Moore confessed to killing Crystal. At the time, he was serving a life sentence without the possibility of parole for the murder of a rival gang member and had been in solitary confinement for two years. After waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), Moore admitted Smyer hired him to murder Crystal and provided the details leading up to the murder to a detective and a deputy district attorney.

Moore was a member of the 190 East Coast Crips gang in 2001 and was trying to recruit Smyer into the gang because he needed a person loyal to him to help sell narcotics at Anderson Park. According to Moore, he killed a rival gang member in self-defense on August 4, 2001. Moore was not arrested for this murder until November 2001.

In September 2001, Smyer began to complain about Crystal and the pregnancy to Moore. He denied the baby was his, believing "she [was] just trying to trap a nigga." Smyer asked Moore if she could be "removed" or if he could "knock her down?" Moore responded, "Man, it's no problem." Smyer then told Moore where Crystal lived and what she looked like. Smyer also told him she typically left her apartment at 7:00 or 7:30 a.m. Moore recalled he and Smyer twice discussed killing Crystal.

Moore went to Crystal's building at least three times with the intent to kill her, but the circumstances were not right each time. He was familiar with the building because his friend also lived there. Once, he saw a woman coming down the stairs, but it was not the woman Smyer wanted him to kill. Moore purchased a .38 caliber handgun and used it to shoot Crystal as well as the rival gang member.[2]

On September 24, Moore "mapped out" the murder. The following morning, he jogged to her building and entered through the open back door to the carport. He waited in the carport in the shadows. He was wearing blue jeans, a dark hoodie, and grayish blue shoes. When she came down the stairs, he shot her in the back of the head, believing this was the quickest way to kill her. Moore knew she was pregnant and knew the baby would die if she died.

Moore met with Smyer a few days afterwards, but Smyer did not appear happy about the murder. He appeared nervous and ready to report Moore to the police. Moore became more

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[2] A forensic examination of the bullet which killed Crystal and the one that killed the rival gang member showed they were fired from two different weapons.

concerned about Smyer when he began to avoid Moore. Moore decided to kill Smyer as well, but was arrested before he could carry out his plan.

When he was arrested for the murder of the rival gang member, Moore immediately confessed to the crime, but claimed self-defense. Moore did not admit to Crystal's murder in 2001, however, because he felt it was shameful. He explained, "it was really a defenseless situation for the victim . . . . I didn't know what to say . . . it wasn't self-defense . . . ." He also explained he did not implicate Smyer in the murder in 2001 because he had "never been the type of person that tells."

Moore stated he was willing to confess now because he was no longer an active member of the 190 East Coast Crips, and he was trying to change from within and take responsibility to correct past wrongdoing. In connection with his efforts to change, he also admitted to killing a man from a group home in 2001, for which three other men were convicted.

The deputy district attorney asked Moore to testify against Smyer because "what he did was wrong. And I'd like to bring him to justice. It's just sort of not fair that you're in and he's out – and two people are dead." However, she told Moore at the beginning of the interview, "I can't make you any deals right now." She repeated at the end, "I can't promise you anything . . . now."

Attacks on Traci W.

After Detective Elizabeth Smith reopened the investigation into Crystal's murder, she ran a records search for Smyer. She obtained two police reports as a result of her search, which implicated Smyer in two attacks on Traci W., his former girlfriend. Detective Smith interviewed Traci in 2011, but she

was unwilling to testify against Smyer. She avoided service of the subpoena to testify at the preliminary hearing. Ultimately, the prosecutor had to take Traci into custody for a conditional examination. At trial in 2017, Traci testified to her relationship with Smyer.

Traci met Smyer in high school in 1998. When Traci became pregnant, Smyer urged her to have an abortion because he wanted to go to college and felt the pregnancy would prevent him from achieving that goal. Smyer believed Traci had tricked him into impregnating her by telling him on one occasion that she did not have a condom when she in fact had it in her purse.

When she was seven months pregnant, Smyer called Traci to arrange to take her to the doctor. He asked her to meet him in the alley behind her apartment. Traci agreed. While waiting for Smyer in the alley, a stranger approached her and asked her for the time. The man then placed a knife to Traci's throat, which cut her. Traci "threw him over and [] stomped him out." Traci's finger was cut in the incident and permanently damaged. It did not appear to be a robbery because the man never asked for Traci's purse. The baby was unharmed and Traci gave birth to a daughter, Sydney, shortly thereafter.

Traci described her attacker as a tall guy with light complexion and dyed light hair. Traci thereafter saw the attacker in a barbershop with Smyer and reported it to her mother. She said the man had "peroxide" in his hair. Traci was interviewed by the police about the attack, but no charges were brought. Seven to eight years after Sydney was born, Traci confided to Smyer's sister of her suspicion that Smyer arranged the attack.

In 2002, Traci again became pregnant with Smyer's child when she and Smyer resumed their relationship after Crystal's murder. He repeatedly "ranted" at Traci to get an abortion, but she refused. Traci testified Smyer sat on her stomach "trying to make the baby go away." He also placed his hand over Traci's mouth so she was unable to breathe properly. Smyer threatened to "just kill that baby right then and there." Traci confided to Smyer's sister that he sat on her stomach, but his sister did not believe her and thought she told the story to make people feel sorry for her.

When she was pregnant with her second child, Traci was living with her grandmother. One day, Smyer called Traci multiple times to ask where she was. Traci told him that she was at her aunt's house, but intended to return to her grandmother's home. When she arrived, a man approached Traci and punched her in the face. He repeatedly stomped on her stomach and her face. He never asked for Traci's purse. Traci was injured and went to the hospital. She later gave birth to a healthy baby girl.

Traci told her aunt she believed Smyer was responsible for the attack. Her belief was based on the fact that she was attacked during both pregnancies, but had not otherwise suffered any similar assaults when she was not pregnant. Traci again confided to Smyer's sister, "It was Derek." She called the police, but was reluctant to implicate Smyer. Traci believed the assailant was Smyer's friend, Akil C. Akil was arrested for the attack, but never charged.

The Trial

Smyer and Moore were jointly charged with the murder of Crystal T. (count 1; Pen. Code, § 187, subd. (a));[3] the murder of her fetus (count 2; § 187, subd. (a)); and conspiracy to commit murder (count 3; § 182, subd. (a)(1)). Each of the murder counts carried three special circumstance allegations: Smyer solicited the murders for financial gain (§ 190.2, subd. (a)(1)), there were multiple victims (§ 190.2, subd. (a)(3)), and Moore committed the murders by lying in wait (§ 190.2, subd. (a)(15)). Smyer was separately charged with solicitation of murder (counts 4 & 5; § 653f, subd. (b)). All counts also carried firearm enhancement allegations. (§ 12022.53, subds. (b)–(d); § 12022, subd. (a)(1).)

During pretrial, the People indicated they were seeking the death penalty against Moore. Concerned over the delay resulting from Moore's preparation for his defense, the trial court severed his case from Smyer's and a jury trial proceeded against Smyer in 2016. The trial against Smyer resulted in a hung jury and a mistrial was declared. The two defendants' matters were then ordered to be re-joined. In 2017, Smyer and Moore were tried jointly with separate juries.

At trial, the People presented evidence of the crimes as set forth above. However, Moore's confession was admitted only in his trial and Smyer's jury did not hear evidence of Moore's confession. The People also presented testimony from Traci's family and Smyer's former girlfriend, R.V., depicting him as a selfish person who was unwilling to spend money on anyone but himself. R.V. testified Smyer was reluctant to pay for supplies or

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[3] All further section references are to the Penal Code unless otherwise specified.

food for the children and paid more for his car than he did to support his children. R.V. also testified Smyer asked her if she would kill for him.

Traci's family testified he changed Traci into "a shell of a person." Smyer gave money only sporadically for the children's needs and rarely visited. Traci herself was often homeless and left the children with her mother or her aunt. Traci's aunt helped the children financially. At one point, the children stayed with Smyer for four months, during which time he often left them alone. The stay was cut short when Smyer was arrested. Smyer's 18-year-old daughter with Traci testified she did not have a good relationship with her father. She testified he was inconsistent in visiting and ill-tempered when he was with her and her sister. She described him as having "kind of monstrous ways."

Moore's Defense

In his defense, Moore presented alibi evidence. His mother testified Moore did not have a car and she gave him money to take the bus to meet with his probation officer after he walked his siblings to school the morning Crystal was shot. Moore's brother, who was eight years old in 2001, confirmed he walked them to school that day and they observed police activity on their way to school. He recalled the day because it was Moore's birthday and the family planned to celebrate later that evening. Detective Smith denied Moore's brother recalled any of these details when she interviewed him in 2002.

Detective Smith acknowledged on cross-examination that Moore met with his probation officer the morning Crystal was shot. He signed in to the probation office at 9:21 a.m. Detective

Smith estimated the probation office to be a thirty-minute drive from Moore's home at that time of day.

Smyer's Defense

Smyer testified on his own behalf. He denied arranging to murder Crystal and her fetus or hiring someone to attack Traci while she was pregnant. He also denied knowing Moore or members of the 190 East Coast Crips. Although he had doubts that he was the father, paternity tests for both his daughters confirmed they were his so he took responsibility for them. He testified he was not worried about the additional financial obligations he would have to shoulder as a result of the children, but instead had a good relationship with his daughters.

Smyer acknowledged he wanted Traci to get an abortion when she told him she was pregnant in 1998. However, he denied pressuring her to get one or arranging for an attack so she would lose the baby. Smyer also denied arranging to pick Traci up in the alley to take her to the doctor. He heard about the attack from one of Traci's neighbors and he immediately drove to the alley. When he arrived, Traci was sitting next to an ambulance with her neck and hand bandaged. She did not accuse him of having someone attack her at that time. Neither did she tell him an African-American man with blond hair attacked her and he did not recall being at a barbershop with someone matching that description. Smyer followed her to the hospital and later returned to the alley to try to discover what had happened.

Smyer testified he attempted to be a good father. He temporarily dropped out of school to work to support the baby, but went back after Sydney was born. After he and Traci broke up, Smyer saw his daughter at least twice a week.

He voluntarily paid $30 in child support and purchased $40 of food and other things for the baby per week. In 2001, when Sydney was three years old, he visited often and she sometimes stayed over the weekend with him at his parents' house. He did not feel she was a financial burden on him because his parents helped and Traci never asked for additional support.

Smyer confirmed he met Crystal at Anderson Park in April 2001 and they began a nonexclusive relationship that ended about a month later. Although he did sometimes go to Anderson Park for lunch, he denied he played basketball or socialized with gang members there. In June or July, Crystal told him she missed her period. She took a pregnancy test, but it was negative. On July 23, he received an email from Crystal's coworker, Jana, informing him Crystal was pregnant.

Smyer wanted Crystal to get an abortion since they were young and no longer together. He expressed this to her at her apartment. Crystal said she had gone to an abortion clinic but had not gone through with it. Crystal said she could not and would not get an abortion.

In fact, he kept in touch with Crystal to see how she was doing, including meeting her at Anderson Park at least once in August and speaking to her over the phone multiple times. He denied speaking to her while she was in Texas, however. He only learned she had gone to Texas when he called her work on September 21 and was told she would be back on September 24. When they spoke after she returned, she was not upset or crying; they merely discussed her trip to Texas and her mother's illness.

Smyer explained he was near Crystal's apartment the night before her murder because his mother needed him to return a crock pot to his aunt, who lived near Crystal. While he was in the area, he withdrew $60 from an ATM and then went home. He denied he met with Moore that night. Smyer explained he could not remember exactly what he did that night when Detective Smith interviewed him on September 27, 2001. As a result, he did not tell her about going to the ATM. Smyer also explained he met his friend Akil at Anderson Park the day of the murder because he had arranged for Akil to interview at his workplace that day.

Smyer testified he resumed his relationship with Traci in December 2001 and she became pregnant again. Although he wanted her to have an abortion, he did not press her. He was not concerned about the burden of paying child support for a second baby. He tried to be supportive and accompanied her to doctor's appointments and was there when she gave birth on September 10, 2002. He visited both his daughters frequently and paid child support. He celebrated Christmas with them in 2010 and they attended his college graduation.

Smyer denied sitting on Traci's stomach during her second pregnancy and threatening to kill the baby. He recalled that he had to restrain her from hitting him during an argument. He also denied any connection to her second attack on June 30, 2002. He denied he knew she was going to her grandmother's house or even where her grandmother lived. He only learned of the attack the next morning. Traci told him she thought a man named Deshawn C. had attacked her. She never told him she believed Akil had attacked her.

Akil testified at trial. He confirmed he did not attack Traci nor did Smyer ask him to. Although Akil was arrested for the 2002 assault against Traci, he was not charged. He subsequently had a falling out with Smyer in 2008 or 2009 over repayment of a loan and had not spoken with him since then.

In September 2003, after he ended his relationship with Traci, Smyer began to date R.V. She worked at Wells Fargo at the time. He admitted he and R.V. committed bank fraud in 2004 by illegally wiring $80,000 from Wells Fargo to the brother of his sister's ex-boyfriend. The man claimed he was robbed at a bus stop and Smyer never received his "cut" of the proceedings. He served 14 months in prison for this crime and paid restitution. As to his comments to R.V. asking if she would kill someone for him, he claimed he asked the question "in the spirit of romance," because he had stated he would die for her.

Smyer explained he financed his 2000 Ford Mustang convertible. His license plate, "MyWhip," was taken from rap songs referring to fast cars whipping through traffic. "MyWhip" in no way referred to a "sexmobile" or getting girls with his car.

During trial, Smyer argued Moore was misidentified by the eyewitnesses. His theory was that if Moore did not kill Crystal, then Smyer did not solicit him to do so. As a result, Smyer's counsel pressed the eye witnesses on their recollection of an event that occurred a decade ago. The defense also presented the testimony of eyewitnesses who were unable to identify the shooter and highlighted the inconsistencies in the other eyewitnesses' statements and the forensic evidence.

In particular, C.H. admitted she did not get a good look at the man's face. Her testimony was also inconsistent with regard to what the suspect was wearing. At the 2017 trial, C.H.

described the suspect as a man who wore all black, with a bandana on his head and a hoodie. However, C.H. had previously told the police on September 27, 2001, shortly after the shooting, that the suspect wore a blue button-down shirt, khaki pants, and a blue baseball cap.[4] When asked about the discrepancy in her memory, C.H. testified she thought her testimony in 2017 was more accurate than in 2001.

C.H. also testified she saw the suspect hold an object in his hand, possibly a pistol, which he dropped in the bushes. Although C.H. directed the police to the area she believed the suspect dropped the object, no firearm was found there.

C.H.'s friend, who walked to school with her that morning, testified she did not see anyone run away from the apartment building after the gunshot. Another friend of C.H.'s recalled an African-American man wearing a black hoodie running into the building through an unlocked door. She then heard a "commotion," the sound of a gunshot, and an African-American man run out of the building and hop the fence. She was unsure whether he was the same man, although he also wore a black hoodie. She observed he had something in his hand, but did not see him throw anything.

O.S., a teenager who lived across the street from Crystal in 2001, saw a man walk through an unlocked door into Crystal's apartment building the morning she was shot. The man was

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[4] At trial in 2017, Officer Williams testified that a long sleeved blue button-down shirt and blue baseball cap were found at Moore's residence. At a prior proceeding, however, he testified he did not recall whether these items were found. No such items were booked in evidence.

wearing "maybe" a maroon button-up shirt and a black hat. He described the man as having hazel eyes and a brown skin tone. O.S. heard a gunshot a few minutes later. The same man walked out of the building, lit a cigarette, and left. O.S. recognized him as someone who lived across the street and who had young children. In 2002, O.S. identified a suspect from a photographic lineup, but testified in 2017 that he made a mistake and would have picked a different person from that lineup.

The defense also challenged the other witnesses' identification of Moore as the shooter at trial. For example, Walter O. hesitated for 20 minutes and only picked out Moore "from the nose down" during the preliminary hearing in 2002. Kenneth M. could not identify a suspect when presented with a photographic six-pack and also did not positively identify Moore at the 2002 preliminary hearing. Detective Williams was not "one hundred percent" sure that the man he saw talking to Smyer at Anderson Park on the day of the shooting was Moore.

The Verdicts and Sentences

Smyer's jury returned guilty verdicts on all the counts against Smyer: second degree murder of Crystal (count 1; § 187, subd. (a)); first degree murder of the fetus (count 2; § 187, subd. (a)); conspiracy (count 3; § 182, subd. (a)(1)); and solicitation of murder (counts 4-5; § 653f, subd. (b)). The jury also found true the multiple-murder and financial gain special circumstance allegations (§ 190.2, subd. (a)(1), (3)) as to count 2 as well as the firearm enhancement allegations (§ 12022, subd. (a)(1)) as to counts 1-3 and 5.

Smyer was sentenced to life imprisonment without the possibility of parole (LWOP) plus 15 years to life plus 2 years, consisting of: (1) the base term of 15 years to life as to count 1,

plus one year pursuant to the firearm enhancement; (2) LWOP as to count 2, plus one year pursuant to the firearm enhancement; (3) concurrent midterms of six years as to counts 4 and 5, and, as to count 5 only, an additional one year for the firearm enhancement. The sentence on count 3 was stayed pursuant to section 654.

Moore's jury likewise found him guilty on all counts: first degree murder (counts 1 & 2) and one count of conspiracy (count 3). As to counts 1 and 2, his jury also found true the multiple-murder and lying in wait special circumstance allegations. (§ 190.2, subds. (a)(1), (a)(3).) As to all counts, his jury found true the various firearm enhancement allegations. (§§ 12022, subd. (a)(1), 12022.53, subds. (b)–(d).)

Because the People sought the death penalty against him, a penalty phase trial began on May 10, 2017. On May 18, 2017, the jury reported it was hopelessly deadlocked and the trial court declared a mistrial. The People chose not to retry the penalty phase.

Moore was sentenced to two consecutive LWOP terms plus 50 years to life, consisting of: (1) an LWOP term for count 1, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d); (2) a consecutive LWOP term for count 2, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). His sentence as to count 3 was stayed pursuant to section 654.

Smyer and Moore timely appealed.

DISCUSSION

Smyer and Moore recite a litany of reasons to reverse their convictions. Smyer contends the evidence was insufficient to support his conviction on all five counts. He further challenges

the trial court's decision to admit evidence of the attacks against Traci, to admit R.V.'s testimony, and to exclude evidence that Crystal's ex-boyfriend had the motive to murder her. Smyer additionally argues the trial court erred by instructing the jury regarding confessions and admissions made by a codefendant and that the prosecutor committed misconduct in her closing argument.

Moore joins in the contentions that the attacks against Traci were improperly admitted and that the evidence regarding third party culpability should have been admitted. He also argues his confession should not have been admitted.

In supplemental briefing, Smyer contends his constitutional rights were violated when the trial court imposed a $10,000 restitution fine without making a determination of his ability to pay. Moore joins in Smyer's challenge to the restitution fine. We conclude their arguments are insufficiently persuasive to reverse the convictions or stay the fine.

I. Sufficiency of The Evidence

Smyer contends there was insufficient evidence to prove any of his convictions for aiding and abetting murder (counts 1 & 2), conspiracy (count 3), and solicitation of murder (counts 4 & 5). We find there was sufficient evidence to support his convictions.

A. Standard of Review

When a defendant contends the evidence was insufficient to prove one or more elements of a crime, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "

(*People v. Davis* (1995) 10 Cal.4th 463, 509, italics omitted.) This is the substantial evidence rule. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) "The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261, italics omitted.)

The same standards apply to cases involving circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) An appellate court may not find substantial evidence based on speculation about a possible scenario that supports the judgment, because "[a] reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled in another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 544.) "[W]here the proven facts give equal support to two inconsistent inferences, neither is established." (*People v. Brown* (1989) 216 Cal.App.3d 596, 600.)

Under the substantial evidence rule, we must presume in support of the judgment the existence of every fact that the trier of fact could reasonably have deduced from the evidence. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) Thus, reversal of the judgment is not warranted if the circumstances reasonably justify the trier of fact's findings, even though we, as the reviewing court, might have reached a contrary finding from these facts. (*People v. Kraft* (2000) 23 Cal.4th 978, 1054.)

B. There is Sufficient Evidence of Aiding and Abetting

Smyer contends there was insufficient evidence to prove he committed murder by aiding and abetting Moore (counts 1 & 2). According to Smyer, only the "very slightest" evidence links him to Moore. Thus, the prosecution's case rested on "pure speculation." He argues the sole evidence linking Smyer to Moore was Crystal's coworker's contradictory and confusing testimony that she might have seen the two men at the park sometime before Crystal's murder. We disagree.

"[A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) To establish aiding and abetting, "the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.] Thus, [the Supreme Court] held, an aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, italics omitted.) "Evidence of a

defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Viewing the evidence in the light most favorable to the judgment and presuming the existence of every fact the trier could reasonably deduce from the evidence, we conclude there was sufficient evidence to support Smyer's conviction under an aiding and abetting theory.

Our conclusion is supported by substantial evidence from which a jury could infer that Smyer knew Moore intended to kill Crystal and her fetus, intended to facilitate the crime, and acted to aid the commission of the crime. The evidence supported a finding Smyer had the motive and opportunity to aid and abet Moore.

Smyer's motive is shown by his complaints about Crystal's pregnancy to her and to her coworker. He wanted her to get an abortion. When she did not, he threatened her when he spoke to her over the phone while she was in Texas. He had previously asked Traci to get an abortion when she was pregnant. When Traci refused, she was assaulted by someone whom she later saw with Smyer.

There is also ample evidence Smyer intended to aid in the murders and acted to do so. Smyer was often at Anderson Park. He met Crystal at the park and ate lunch with her there. Anderson Park was claimed by the 190 East Coast Crips, of which Moore is a member. Crystal's coworker saw Smyer with Moore at the park.

Although there is ample eyewitness testimony placing Moore at the crime scene at the time of the murder, there does not appear to be any direct connection between Crystal and Moore, besides Smyer. It is Smyer who had a relationship with Crystal; she was carrying his child. He also knew all of the information about her that Moore did not: where she lived, when she left for work, and when she would be back from her trip. Although Smyer lived over 16 miles away, he withdrew money from an ATM near Crystal's apartment after 11:00 p.m. the night before her murder. That same night, Moore was seen loitering near her apartment.

On the other hand, there was no evidence Moore held any animus against Crystal, much less knew who she was, where she lived, when she went to work, and when she would be back from Texas. There was no evidence the attack was motivated by a robbery. Nothing appeared to be taken from Crystal; her purse was returned to her sister. This is circumstantial evidence from which a jury could infer Smyer encouraged and aided Moore by providing him with the necessary information to kill Crystal. It was reasonable for the jury to infer from these facts that Smyer aided and abetted Moore in Crystal's murder.

C. There is Sufficient Evidence of a Conspiracy

Smyer argues there was insufficient evidence of a conspiracy to commit murder (count 3). He contends the evidence was insufficient to prove he agreed with Moore to murder Crystal and the fetus or that he committed an overt act in furtherance of the conspiracy. We conclude the evidence, while circumstantial, was sufficient to prove the crime of conspiracy in this matter.

"One who conspires with others to commit a felony is guilty as a principal. (§ 31.) ' "Each member of the conspiracy is liable for the acts of any of the others in carrying out the common purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design." [Citations.]' [Citation.]" (*In re Hardy* (2007) 41 Cal.4th 977, 1025–1026, italics omitted.) "[A]ll conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder . . . ." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238.)

A criminal conspiracy requires: (1) an agreement between two or more people, (2) who have the specific intent to agree or conspire to commit an offense, (3) the specific intent to commit that offense, and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. (§ 182, subd. (a); *People v. Penunuri* (2018) 5 Cal.5th 126, 145; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1024–1025.) " ' "The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the conspiracy." ' " (*People v. Penunuri, supra,* at p. 145.)

The overt act need not be a criminal offense, nor must it be committed by the defendant. (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708; *People v. Ragone* (1948) 84 Cal.App.2d 476, 480.) Moreover, "[d]isagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)

That the target offense was actually completed can be highly persuasive circumstantial evidence of the presence of a conspiracy to commit that offense. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464, disapproved on another ground in *People v. Mesa* (2012) 54 Cal.4th 191, 199.)

"The elements of conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.' [Citations.] To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design.' [Citation.] [¶] A conviction of conspiracy to commit murder requires a finding of intent to kill. [Citation.] Because there rarely is direct evidence of a defendant's intent, '[s]uch intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' [Citation.]" (*People v. Vu, supra,* 143 Cal.App.4th at pp. 1024–1025.)

Much of the same evidence that supports Smyer's conviction for conspiracy also supports his conviction for aiding and abetting. Here, we rely on, but do not repeat, the evidence from the previous discussion. (See *People v. Maciel* (2013) 57 Cal.4th 482, 518 [evidence of a defendant's involvement in a conspiracy to commit a murder may also show the defendant aided and abetted in the commission of murder].)

In *People v. Mullins* (2018) 19 Cal.App.5th 594 (*Mullins*), the court found substantial evidence of a conspiracy where the evidence showed the defendant used the same strategy as he had used in previous robberies. In *Mullins*, the defendant had

worked with his codefendant to rob individuals who had just used Bank of America ATMs. Weeks after the initial robberies, the defendant was with an unidentified man at a mall. When they entered the mall, they went straight to the Bank of America ATM and lingered there. When no one used the machine, they strolled through the mall, but soon returned to their position by the ATM. They refused to leave until mall security escorted them out. The court concluded the jury could reasonably infer from this behavior that the defendant had conspired with the unidentified male to commit robbery using the same scheme as he had used with his codefendant in the previous robberies. (*Id.* at p. 607.)

Contrary to Smyer's argument, there was sufficient circumstantial evidence of all elements of the crime of conspiracy. As in *Mullins,* there is substantial evidence of a conspiracy because the evidence showed Smyer used the same strategy to deal with Crystal's unwanted pregnancy as he had with both of Traci's pregnancies. As he had previously done with Traci, he repeatedly demanded that Crystal get an abortion. When she refused, he threatened her. Then, he arranged for someone to attack her. Traci testified the first attack resulted in her neck being cut and permanent damage to her finger. It is possible Traci could have died if she had not fought back.

There was also substantial circumstantial evidence proving Smyer and Moore reached an agreement to murder Crystal and her fetus. That Crystal was actually murdered is highly persuasive circumstantial evidence of a conspiracy. (See *People v. Herrera, supra*, 70 Cal.App.4th at p. 1464.)

Although it is unnecessary to prove Moore and Smyer met and expressly agreed to the conspiracy, there was evidence that Moore and Smyer did meet. Crystal's coworker testified she had

observed Smyer and Moore at Anderson Park together. Indeed, Smyer was detained at Anderson Park shortly after the murder and Detective Williams recognized Moore as one of the men at the park with him. Circumstantial evidence also demonstrated Smyer had the motive and means to kill: he demanded she have an abortion and when she refused, he threatened her just as he did with Traci. The police also discovered a chat room on his computer with a chat asking for advice on how to deal with an unwanted pregnancy.

Moreover, the evidence shows Smyer committed an overt act in furtherance of the conspiracy when the evidence placed him near Crystal's home at 11:32 p.m. on the night before her murder, despite living at least 16 miles away. An ATM slip showed he withdrew cash from a 7-Eleven located eight blocks from Crystal's home. This was alleged as overt act number 3.[5] This evidence supports a finding that Smyer helped Moore plan the murder since Moore was also in the vicinity that night. Moore was seen by Crystal's sister lingering outside Crystal's apartment, apparently waiting for an opportunity to commit the

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[5] The overt acts presented to the jury were as follows: "1) Skyler Jefferson Moore and Derek Paul Smyer discussed killing Crystal [T.] in Anderson Park prior to September 25, 2001. [¶] 2) Skyler Jefferson Moore agreed to kill Crystal [T.] for Derek Paul Smyer in exchange for his loyalty to 190th East Coast Crips. [¶] 3) On September 24, 2001, at 11:23 p.m., Derek Paul Smyer was within 3 1/2 miles of Skyler Jefferson Moore's residence and Crystal [T.'s] residence. [¶] 4) On September 25, 2001, between 12:30 a.m. and 1:00 a.m. Skyler Jefferson Moore was in the area of Crystal [T's] residence."

crime (overt act 4). From these facts, the jury could reasonably infer a conspiracy between Smyer and Moore to kill Crystal and her fetus.

D. There is Sufficient Evidence of Solicitation

Smyer contends reversal of his convictions for solicitation of murder is required because it was not proven with sufficient evidence.[6] We disagree.

Section 653f, subdivision (g), requires that the crime of solicitation for murder "shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances." The testifying witness must give ' "positive" or "direct" evidence of facts that are incompatible with innocence, and corroborating evidence of circumstances which, independent of the direct

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[6] Smyer raises two other contentions relating to the solicitation counts. Smyer first contends he was improperly found to have been armed (§ 12022, subd. (a)(1)) in the commission of count 5, despite there being no evidence to support the allegation. The Attorney General concedes this was error and we agree. There was simply no evidence Smyer was armed during the solicitation. We order the enhancement stricken. Smyer next contends his sentence for the solicitation counts should have been stayed under section 654, given the sentences imposed for murder in counts 1 and 2. The Attorney General agrees that the sentences should be stayed because the evidence supports the conclusion that Smyer held a single objective in the commission of the crimes: to kill Crystal and her fetus. We find this contention meritorious as well because the solicitation and subsequent murders constituted an indivisible course of conduct subject to section 654. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) As a result, we order the abstract of judgment amended to reflect the six-year midterm sentences on counts 4 and 5 are imposed and stayed, pursuant to section 654.

evidence, tend to show guilt.' " (*People v. Phillips* (1985) 41 Cal.3d 29, 75–76 (*Phillips).*) "The purpose of section 653f [ ] is to guard against convictions for solicitation based on the testimony of one person who may have suspect motives." (*Id.* at p. 76.)

In *Phillips,* the prosecution presented evidence of a letter sent by the defendant while he was in prison soliciting the murder of several witnesses against him. The court found the defendant's letter rendered him a testifying "witness" within the meaning of section 653f despite the fact the letter was somewhat ambiguous as to the conduct it solicited. (*Phillips, supra,* 41 Cal.3d at p. 76.) Corroborating circumstances in *Phillips* included evidence showing the witnesses would testify against the defendant and that he had previously threatened them. (*Ibid.*)

Here, there is testimony from one witness, Crystal's coworker, Jana P., and substantial corroborating evidence that tends to independently show Smyer's guilt. This proof satisfies the express requirements of section 653f, and also satisfies the purpose of the statute "to guard against convictions for solicitation based on the testimony of one person who may have suspect motives." (*Phillips, supra,* 41 Cal.3d at p. 76.)

Jana testified she saw Smyer and Moore together at Anderson Park several times before the murder. She also identified them at Anderson Park after the murder, when accompanied by Detective Williams. Jana's testimony establishes Smyer and Moore communicated both before and directly after the murder. Jana did not have suspect motives; there is no indication Jana had any reason to lie in order to implicate Smyer in the crime.

Moreover, the corroborating evidence amply demonstrated Smyer's motive and ability to solicit Crystal's murder. Smyer wanted Crystal to get an abortion. When she refused, he threatened her. She was then murdered by someone fitting Moore's description, who was a member of a gang claiming territory in the park Smyer frequented. The evidence also demonstrated that Smyer had undertaken nearly the same acts when Traci was pregnant with his daughters. Together, this evidence is more than sufficient to fulfill the requirements of section 653f.

Smyer contends that even if Jana correctly identified Moore as the person she saw with Smyer at Anderson Park multiple times, that testimony does not constitute direct or positive evidence that Smyer solicited Moore to commit murder. We disagree. They had no other apparent reason to meet than to plan the murder and discuss its execution thereafter. The timing of their meetings coincide with discussions before and after the murder. There is no other explanation for Crystal's murder by Moore, someone she did not know and who took nothing from her, except that Smyer solicited it. Jana's testimony that she saw Moore with Smyer before the murder and directly afterwards is sufficient to comply with the requirement that at least one witness provide testimony under section 653f. The statute does not require anything more than the testimony of one witness and corroborating evidence. Both are present here.

II. Evidentiary Issues

A. The Assaults Against Traci

Both Smyer and Moore contend the attacks on Traci while she was pregnant are inadmissible under Evidence Code sections

1101 and 352. The trial court did not abuse its discretion to admit evidence of the assaults.

1. Proceedings Below

Smyer moved to exclude evidence of the 1998 and 2002 attacks on Traci on the ground the evidence was irrelevant, speculative, and its probative value was substantially outweighed by the probability that its admission would necessitate undue consumption of time, create substantial danger of undue prejudice, and confuse or mislead the jury. Moore joined in the motion. The trial court determined the assaults on Traci were admissible under Evidence Code section 1101, subdivision (b), to show a common plan and scheme, intent, or motive. The trial court noted it based its reasoning and decision on a prior ruling on a motion to exclude previously filed in 2016.

At the hearing on the previous motion to exclude, the parties argued the similarities and differences attendant to each of the assaults against Traci and Crystal. Smyer asserted substantially the same arguments as he did in 2017. Moore's trial counsel argued the assaults were irrelevant as to his client because there was no evidence to tie Moore to any of the attacks. Indeed, Moore did not even know Smyer in 1998. The trial court admitted the evidence and Traci and members of her family testified at trial about the attacks as described above.

2. Legal Principles and Standard of Review

Under Evidence Code section 1101, subdivision (a), evidence of a person's prior acts is inadmissible to prove his conduct on a specific occasion, but may be admitted to prove some other fact such as motive, opportunity, intent, preparation, plan, knowledge, or identity. (Evid. Code, § 1101, subd. (b).) To be

admissible under Evidence Code section 1101, subdivision (b), prior acts must be in some way similar to the alleged act at issue.

"[T]here exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: 'The least degree of similarity . . . is required in order to prove intent . . .' . . . By contrast, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity." (*People v. Soper* (2009) 45 Cal.4th 759, 776, italics & fns. omitted.)

"[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

In addition to an evaluation under Evidence Code section 1101, subdivision (b), the court must also consider whether to admit or exclude prior act evidence under Evidence Code section 352, which requires evidence be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Evidence of prior, uncharged offenses "is so prejudicial that admission requires extremely careful analysis." [Citations.]' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value.' " (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404, italics omitted.)

We review the trial court's admission of evidence for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

3. Evidence of the prior uncharged attacks on Traci was properly admitted in Smyer's case.

Smyer contends the trial court prejudicially erred in admitting evidence of the attacks on Traci in his case. He claims the trial court failed to make a preliminary determination that sufficient evidence proved Smyer was connected to the attacks. Further he claims the trial court abused its discretion to admit the evidence because it was substantially more prejudicial than probative, tending to show Smyer was a poor father to his children and partner to Traci, rather than the elements of the crimes charged. We disagree.

a. The trial court made a preliminary determination of relevance.

As to Smyer's first contention, we find the trial court did make this preliminary determination.

People v. Simon (1986) 184 Cal.App.3d 125 (*Simon*), is instructive. There, the defendant shot a man in his former girlfriend's house. (*Id.* at pp. 127–129.) The defendant claimed he shot the man in self-defense. At trial, the prosecution offered evidence of a prior incident in which the defendant pulled a gun on a drug dealer in his girlfriend's house. (*Id.* at pp. 128–129.)

The defense argued that this prior incident was not relevant because the defendant was motivated, on that occasion, to help his girlfriend kick her drug habit and, in the instant case, the prosecution's theory was that the defendant killed the victim out of jealousy. (*Id*. at p. 130.)

The Court of Appeal agreed, finding that the earlier assault would only be relevant in the instant case if it had been committed with the same motive, i.e., jealousy. Because there was a dispute over the motive for that earlier assault, the appellate court determined that the trial court should have made a threshold evaluation of its admissibility and the jury should have been instructed that it had to find, as a preliminary fact, that the motive for the earlier assault was jealousy, before it could consider the prior offense under Evidence Code section 1101(b). (*Simon, supra*, 184 Cal.App.3d at pp. 129–132.)

In reaching its conclusion, the *Simon* court utilized Evidence Code section 403, subdivision (a), which provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when . . . [¶] . . . The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself." (*Simon, supra,* 184 Cal.App.3d at p. 131.) The proponent needs to demonstrate the preliminary fact by a preponderance of the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.)

Once the trial court determines there is evidence sufficient to sustain a finding of the preliminary fact, the jury must decide whether the preliminary fact exists. (*People v. Lucas* (1995) 12 Cal.4th 415, 466 (*Lucas*); Legis. committee com., 29B, pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 403, p. 361.) Thus, when a defendant claims he did not commit an uncharged prior act, the trial court must first determine whether it is relevant and admissible. Then, the jury must decide the weight—if any—to be accorded to the proffered evidence. (*Lucas, supra,* 12 Cal.4th at p. 468; *Simon*, *supra*, 184 Cal.App.3d at pp. 129–130.)

Here, the record clearly shows the trial court considered whether there was sufficient evidence of Smyer's connection to the prior attacks. At the hearing on the motion to exclude, Smyer's trial counsel did not concede Smyer was behind the attacks against Traci. He instead argued, there was a "problem with identity. There is no evidence that Smyer was ever involved in either the 1998 attack or the 2002 attack." The prosecution argued there were sufficient similarities between the attacks against Traci and the attack against Crystal that the evidence should be allowed to be considered for identity, intent, common plan and scheme, or motive.

The trial court ruled the evidence of the prior attacks was admissible to show intent, common plan or scheme, or motive, but not identity. It cited to *People v. McCurdy* (2014) 59 Cal.4th 1063 for the proposition that "the admission of the perpetrator's intent requires neither that defendant concede identity nor the court assume the defendant committed both sets of acts. There must be sufficient evidence for the jury to find defendant committed both sets of facts and sufficient similarities to demonstrate that in each incident the perpetrator acted with the

same intent or motive." The trial court further stated it had evaluated the evidence under Evidence Section 352.

The record demonstrates the parties argued the issue and the trial court determined there was enough evidence to allow the jury to determine the existence of the preliminary fact. Smyer fails to cite to any authority which requires the trial court hold a separate hearing to determine the preliminary fact under Evidence Code section 403. Neither does he cite to any authority which requires the trial court make express findings about the preliminary fact. "A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute." (Evid. Code, § 402, subd. (c).)

In addition, the trial court did not abuse its discretion to determine that there existed a preponderance of the evidence to support a finding of the preliminary fact. Traci testified Smyer asked her to meet him in the alley where she was first attacked. She also testified Smyer repeatedly called her the day of the second attack to determine her location. Traci also relayed her suspicions about her attackers to Smyer's sister and her family. This was sufficient evidence to support a finding of the preliminary fact.

b. The evidence of the attacks was substantially more probative than prejudicial.

Next, Smyer contends the attacks on Traci and the accompanying testimony about Smyer's character as a bad parent and partner consumed undue time, confused the issues, and encouraged the jury to reach verdicts based on improper character evidence. He argues the trial court abused its

discretion to admit this testimony from Traci and her family members because it was unduly prejudicial. We disagree.

The prejudice to be avoided by Evidence Code section 352 refers to evidence that " 'uniquely tends to evoke an emotional bias' " against a party as an individual, while having only slight probative value with regard to the issues. (*People v. Scheid* (1997) 16 Cal.4th 1, 19.) Here, the trial court did not abuse its discretion in concluding the probative value of the evidence substantially outweighed its prejudice.

As discussed above, the testimony from Traci and her family was relevant to demonstrate intent, motive, and common plan or scheme.[7] The prosecution's theory of the case was that Smyer did not want the burden of another child. As a result, the testimony that he was a poor father to his existing children was relevant to demonstrate his motive and intent to kill Crystal in order to avoid having another child. This was highly probative evidence; it connected Smyer to the crime when there was no evidence he was there.

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[7] Smyer briefly argues the uncharged acts were not similar to the current offense because the attacks against Traci were physical beatings while Crystal was shot in the head. However, Smyer admits, "the prosecution's motive theory was similar." Given Smyer's concession, we find the prior uncharged acts were admissible under Evidence Code section 1101, subdivision (b), to show motive regardless of whether they also showed intent and common plan or scheme. (*People v. Butler* (2005) 127 Cal.App.4th 49, 60 [Evidence Code 1101 evidence admissible to explain defendant's motive].)

Further, the evidence was not unduly prejudicial. The prior assaults against Traci, which did not result in any deaths, were not more inflammatory than the charged crimes. Even less likely to evoke an emotional bias against Smyer was the challenged testimony that Smyer was not an ideal father or partner. This evidence did not encourage the jury to reach verdicts based on improper character evidence or confuse the issues.

Neither did the testimony consume a substantial amount of time at trial. According to Smyer, the testimony of Traci and her family members consumed three days of trial and 218 pages of reporter's transcript. The entire trial lasted almost four weeks, represented by 14 volumes of reporter's transcripts, each of which contain approximately 200-300 pages. In comparing the length of the trial, the challenged testimony did not consume an undue amount of time.

Given the probative value of the challenged testimony to prove motive and the lack of undue prejudice, the trial court did not abuse its discretion to admit the evidence of the prior assaults under Evidence Code sections 352 and 1101, subdivision (b).

4. The Evidence of the Uncharged Attacks Was Properly Admitted in Moore's Case

Moore argues the evidence of the attacks on Traci was irrelevant to his case because he was not involved in either of the attacks and there was no evidence he shared the intent, motive, or common scheme or plan involved in the crimes. Thus, any probative value was far outweighed by the highly inflammatory evidence that another woman was attacked twice while she was pregnant. Moore contends there was a risk that Moore's jury

would speculate he was involved in the uncharged attacks and was the "type of person" who would commit the charged murder. As a result, the evidence of the uncharged attacks should have been kept from his jury. Moore is wrong.

The evidence was relevant to his case because there was no connection between Moore and Crystal, except through Smyer. The prosecution's case against Moore was predicated on Smyer's motive to eliminate the women he had impregnated. Thus, the evidence was not admitted as a prior bad act of Moore's under Evidence Code section 1101. The evidence was admitted instead because it explained why Moore attacked Crystal, someone with whom he had no relationship. The record is clear that Moore was not involved in the attacks against Traci and the prosecution did not pose that theory to either jury.

In evaluating Moore's challenge to the evidence under Evidence Code section 352, we conclude there was little prejudice to Moore in admitting the evidence of the uncharged assaults. As discussed above, there was no indication Moore committed either of the attacks against Traci and the evidence was highly probative.

Even if the trial court had abused its discretion by admitting evidence of the uncharged attacks against Traci, any error was harmless. (*People v. Marks* (2003) 31 Cal.4th 197, 227 (*Marks*); *People v. Watson* (1956) 46 Cal.2d 818, 836.)[8] Moore

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[8] Moore argues evidence of the uncharged assaults violated his federal Constitutional rights to due process and a fair trial. Thus, our harmless error analysis must be evaluated under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24. Generally, "the application of ordinary rules of evidence

confessed to the shooting. He was also identified by Crystal's sister and her neighbor as the man who was loitering outside Crystal's apartment the night before the murder. He was seen by C.H. and another of Crystal's neighbors running away from the scene of the crime. Given these facts, it was not reasonably probable Moore would have received a different outcome but for the evidence of the uncharged attacks.

B. R.V.'s Testimony

R.V., whom Smyer dated after his relationship with Traci ended, testified at trial about a bank fraud for which she and Smyer were convicted. R.V. also described about unflattering aspects of Smyer's character and lifestyle, including that he complained about buying diapers for his children, yet drove a convertible Mustang. Smyer contends on appeal that R.V.'s testimony should have been excluded because it was irrelevant character evidence under Evidence Code section 1101 and unduly prejudicial under Evidence Code section 352. The trial court did not abuse its discretion to admit the entirety of R.V.'s testimony.

1. Proceedings Below

Prior to trial in 2017, Smyer moved to exclude evidence of his 2004 federal conviction for bank fraud on the grounds it was irrelevant character evidence and its probative value was outweighed by undue consumption of time and substantial danger of undue prejudice, confusion of issues, and misleading

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like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of Watson . . . ." (*Marks, supra,* 31 Cal.4th at p. 227.) Even evaluated under the *Chapman* standard, however, we find the error, if any, was harmless beyond a reasonable doubt.

the jury. The prosecutor indicated she did not intend to introduce evidence of the prior conviction unless Smyer decided to testify. However, she noted there was other evidence the People intended to elicit from R.V. The trial court indicated it would delay ruling on the motion until the issue presented itself.

R.V. was called to testify in the People's case-in-chief. She testified she worked at a credit union and Smyer worked at Wells Fargo bank at the time they were dating. She also admitted she was convicted of bank fraud in federal court and was required to pay back "jointly" $80,000. She denied taking the money. When the prosecutor asked who she told about how the bank worked, defense counsel objected. At sidebar, the trial court indicated the fact of Smyer's conviction was not admissible. The prosecutor asserted she was only trying to ask R.V. who she told about the bank's practices, not introduce evidence of the conviction. The trial court overruled defense counsel's objection, allowing R.V. to testify she told Smyer about how her credit union operated.

R.V. was then questioned about her relationship with Smyer. She testified Smyer told her he only had one child, rather than two, and he was often frustrated when he had to buy diapers for his child. Early on in the relationship, Smyer initiated a conversation about birth control and insisted R.V. stay on it. R.V. testified she typically paid her own way when she dated Smyer, including when they went on a cruise together. R.V. also testified Smyer once asked if she would kill for him when they were professing their love for one another. R.V. thought it was an odd question, but answered yes, and chose not to pursue it. She also met Akil several times throughout their relationship.

Smyer chose to testify in his own defense and admitted he was convicted of bank fraud. He claimed both he and R.V. had the idea to do it. On rebuttal, R.V. provided further details of the bank fraud conviction and Smyer's role in it.

2. Evidence of the bank fraud conviction was properly admitted.

Smyer contends R.V.'s testimony of the prior conviction should have been excluded because it was irrelevant to the charges against him and was inadmissible character evidence. There was no error, prejudicial or otherwise, because Smyer chose to admit he committed bank fraud during his own testimony. Indeed, Smyer admitted to the conviction before R.V. testified about it on rebuttal.[9]

Even if Smyer had not admitted the prior conviction during his testimony, the evidence of his conviction through R.V.'s rebuttal testimony was admissible pursuant to *People v. Castro* (1985) 38 Cal.3d 301, which held that a testifying defendant may be impeached with the fact of a prior moral turpitude conviction. Moral turpitude crimes include those involving fraud and those in which an intent to defraud is an essential element. (*In re Hallinan* (1954) 43 Cal.2d 243, 247; *Carey v. Board of Medical Examiners* (1977) 66 Cal.App.3d 538, 541.)

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[9] R.V.'s testimony on direct that she told Smyer about the banking procedures at her credit union was vague as to whether Smyer was also convicted for bank fraud; the jury could reasonably infer Smyer participated, but was not convicted. To the extent Smyer contends the trial court erred in allowing this testimony from R.V., Smyer does not contend he chose to testify solely due to this portion of R.V.'s testimony.

3. The remainder of R.V.'s testimony was properly admitted.

Smyer challenges the admission of the remainder of R.V.'s testimony because it depicts him in an unflattering light. According to Smyer, the testimony "paint[s] him as a man who used women, did not want the women he dated to get pregnant, committed crimes, complained about supporting his children, and meanwhile drove a convertible Mustang." However, Smyer objected to none of the testimony about which he now complains. Therefore, any claim of error related to the admission of this evidence must be deemed forfeited. (*People v. Mills* (2010) 48 Cal.4th 158, 194.)

Anticipating a forfeiture analysis, Smyer contends his trial counsel provided ineffective assistance of counsel for failing to object to R.V.'s testimony. To prevail on an ineffective assistance of counsel claim, a defendant must establish that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, that it is reasonably probable counsel's error made a difference in the outcome of the case, and that the error was not attributable to a reasonable tactical decision. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1157.) Assuming that Smyer's trial counsel should have objected to R.V.'s testimony, and that the objections would not have been futile, we are not persuaded that the purported deficient performance by trial counsel prejudiced Smyer.

Here, the jury heard testimony from Sydney, Smyer's eldest daughter with Traci, and Traci's other family that similarly depicted him in an unflattering light. Sydney testified Smyer had "monstrous ways" and his contact with them was intermittent. Traci's family testified her aunt and grandmother

were the main caregivers for the children. Smyer himself testified that he bought a convertible Mustang in August 2000, which he financed through Ford Motor Company. He also testified he paid $70 per week to Traci in child support during that time period. Given this evidence, it is unlikely Smyer would have received a different outcome even if his counsel had objected and R.V.'s testimony had been excluded.

C. Third Party Culpability

Smyer moved prior to trial to admit evidence that another person had a motive to kill Crystal: her son's father, Kenneth W. The trial court agreed there was evidence that Kenneth had a motive to kill Crystal. However, it found there was no direct or circumstantial evidence which otherwise linked Kenneth to the perpetration of the crime. The trial court concluded defense counsel was making "many jumps and leaps on this matter with [his] interpretation [of the evidence] . . . " As a result, the trial court denied the motion and both Smyer and Moore challenge that ruling on appeal. We find no error.

1. Applicable Law

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in *Mendez*, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual

perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*).)

In *Hall,* the California Supreme Court determined the defendant should have been allowed to present evidence that a third party had a motive to murder the victim. There, the defendant presented evidence which placed the third party at the scene of the crime. There were "waffle-stomper" boot prints in the victim's bedroom, which were of the same type the third party wore. There was evidence the victim was killed by someone who was left-handed; the defendant was right-handed, but the third party was left-handed. Additionally, the third party was interviewed by the police and provided details of the murder that only someone present at the murder could know. (*Hall, supra,* 41 Cal.3d at p. 831.)

We review the trial court's ruling for an abuse of discretion. (*People v. Elliott* (2012) 53 Cal.4th 535, 581; *People v. Lewis* (2001) 26 Cal.4th 334, 372.)

2. Proceedings Below

Prior to trial, Smyer sought to introduce evidence of third party culpability. He proffered the following evidence in support of his motion. Kenneth had a motive to kill Crystal, due to tensions over their son and unpaid child support. Crystal frequently refused Kenneth visitation with his son, depending on her mood, and they regularly argued about visitation. Kenneth's wages were being garnished in 2001 due to unpaid child support. Kenneth had offered to pay Crystal more than she was receiving if she would agree to stop the garnishment. Crystal refused. As a result of the garnishment, Kenneth was unable to afford his own apartment. He also had his driver license suspended in July 2001 due to unpaid child support. As a result, he had trouble

finding work. He described Crystal to an investigator hired by Smyer as an "evil person." After Crystal died, the child support and garnishment stopped. Crystal's son received approximately $100,000 in life insurance after her death and he went to live with Crystal's sister.

Aside from evidence of motive, Smyer asserted circumstantial evidence linked Kenneth to the crime. Smyer contended it was Kenneth with whom Crystal argued because a picture of their son was found laying on the ground near her body. Kenneth had admitted he and Crystal argued about visitation and unpaid child support.

Smyer claimed the physical evidence tended to show Crystal knew the person who killed her and had an argument with him before the shooting. In support of this theory, Smyer noted Crystal propped open the door with a plant, and placed her purse on the trunk of the car because she knew she would be discussing issues with Kenneth. Smyer then posits that Crystal had a confrontation with the killer, as evidenced by the overturned plant and C.H.'s testimony that she heard a five-to-seven-minute argument between a man and a woman, which caused her and her friends to stop and listen. After the shooting, C.H. saw the shooter run north, in the direction of Kenneth' grandmother's house, where he stayed the night before. Finally, Smyer relied on contradictions between Kenneth's statements to the defense's investigator and to the police about his whereabouts on September 24, 2001.

Kenneth denied having anything to do with Crystal's murder. When they investigated him in 2001 and 2002, he told the police that he was at his girlfriend's house on 45th Street the night before the murder. In 2015, he told the defense

investigator he was at his grandmother's home on 43rd Street the night before the murder. Those homes were located approximately 10 miles north of Crystal's home. He also told the investigator that his friend, who lived next door, owned a black sedan.

The trial court denied Smyer's motion, finding there was no direct or circumstantial evidence linking Kenneth to the perpetration of the crime.

3. There was no evidence linking Kenneth to the crime.

The trial court did not abuse its discretion in deciding to exclude evidence of third-party culpability. Smyer failed to provide evidence linking Kenneth to the actual perpetration of the crime. While there is ample evidence of Kenneth's motive to kill Crystal, there is no evidence linking him to the crime or the crime scene. In *Hall,* the third party provided details of the murder which would only be known to someone who was there and there were bootprints of the type worn by the third party. No such similar evidence placed Kenneth at the crime scene. Certainly, no eye witness identified Kenneth. The evidence cited by Smyer to support his conjecture—the argument heard by C.H. and her friends, and the placement of the potted plant and Crystal's purse—do not specifically point to Kenneth. All of that evidence could equally have applied to someone other than Kenneth.

As noted by the trial court, the evidence relied upon by Smyer required "many jumps and leaps" to connect Kenneth with the crime scene. While C.H. heard a man and a woman arguing, she did not know who was arguing and did not hear what they argued about. The fact the door was propped open required the

assumption that Crystal propped open the door, rather than the paramedics or the other people who lived in the building. Also, it required she did it to allow Kenneth into the building, rather than someone else she knew. The fact that Crystal's purse was on the trunk of the car required an assumption that she was the one who put it there, rather than the paramedics or police, and that she did so in order to turn her attention to Kenneth, rather than to look for something inside it or pick up something from the floor. The photograph of their son could very well have fallen out of her purse. Or, she could have pulled it out to show someone. In short, the evidence failed to link Kenneth, rather than someone else, to the crime scene and the actual perpetration of the crime.

D. Moore's Confession

Moore argues his November 6, 2011 confession should not have been admitted at trial because it was the product of the detectives' prior, improper promises and inducements to not charge him with the death penalty and to transfer him from solitary confinement. Moore also contends the confession was obtained in violation of his *Miranda* rights. We disagree and conclude the November 6 confession was properly admitted.

1. Three Interviews With Moore in 2011

On June 15, 2011, Detective Smith, the detective who had investigated Crystal's murder in 2001, decided to interview Moore one more time with her partner, Detective Richard Lopez, in an effort to close out the case because she was planning to retire. The detectives advised him that they did not read him his *Miranda* rights because they were "not trying to put a case" on Moore or use his statements against him, but just wanted to get the truth about Crystal's murder. Moore initially denied any

recollection of Crystal. Detective Lopez stated, "Well, we're looking for some help on some cases. Now, one hand washes the other . . . if you tell us something that you remember, truthfully remember, that we can corroborate, we can get you moved out of California."

After some discussion of Moore's solitary confinement and his need for protection from other inmates, Moore admitted he shot Crystal to "uphold his end of the bargain." He stated he was looking at Smyer as the "central recruit" to help him with drug sales at the park. He explained, "it was like an initiation . . ." "I was just basically testing this boy to see how…can he hold his water . . . I was basically looking for . . . somebody new to the game that we can . . . utilize . . . for the benefit of [our gang]." Moore went on to explain that this meant distribution of guns, dope and "all type of like illegal criminal activity basically." Moore then stated that after the murder, Smyer "was [basically] holding up his end of the bargain" by selling a small amount of dope for him. But, it did not progress further because Moore was arrested for the murder of the rival gang member.

Moore said he was relieved to "get some closure." He then asked "to apply for the situation, out-of-state transfer." The detectives discussed an interstate transfer for Moore's protection since he would be cooperating with the police. Smith asked if Moore would be willing to come back to Los Angeles County Jail. Lopez stated they would watch out for his safety there. Moore said he would. Lopez stated, "[W]e're gonna go back down and work some stuff out. We'll probably be back up to talk to you."

Detectives Smith and Lopez interviewed Moore a second time on October 18, 2011. Detective Smith testified he was still in solitary confinement at that time. They told him the

prosecutor wanted to proceed against Smyer because "[t]hey think Derek's [the] bad guy . . . ." They told Moore the prosecutor wanted him to plead guilty to murder and testify against Smyer. They informed Moore, "They're gonna run whatever this [sentence] is concurrent to what you're already doing." Moore stated he was worried about the death penalty because he had been previously charged with it in Crystal's murder. Detective Smith responded, "The death penalty isn't on the table."

Moore then considered whether he could still be sent to another prison with multiple convictions. Detective Smith responded that she did not know, but, "[w]e can talk to the D.A. when we get down there." Detective Lopez, however, indicated that Moore's housing would be dependent on the Department of Corrections. He assured Moore that if the Department of Corrections wanted to send him to another prison, like San Quentin, "I'd fight it . . . I'd give them a letter telling them, 'no, no, wait a minute. This guy testified for us' . . . I've done that a million times."

After Moore waived his *Miranda* warnings, he confirmed his June 5, 2011 statement to the detectives was truthful. He repeated that he killed Crystal with a single shot to her head after Smyer requested Moore "eliminate" a problem he had. Smyer offered him money, but Moore knew that "money was gonna come if we can get him on the team . . ." Moore was looking for a loyal soldier. After the murder, Smyer avoided him and Moore doubted his loyalty. He decided to kill Smyer, but was arrested before he could carry out his plan.

A third interview was conducted on November 6, 2011, by Detective Smith and a deputy district attorney. During that interview, Moore was read his rights under *Miranda* and agreed

to waive them. He then confessed to Crystal's murder and described how he did it. He also stated Smyer hired him to commit it. He acknowledged he had read all of the police reports and other investigative materials provided by the deputy district attorney about Crystal's murder in 2001. The deputy district attorney acknowledged he wanted an interstate transfer, but made no promises. The deputy district attorney stated, "I would like you to testify against Mr. Smyer. But – of course – that's going to be up to you and your lawyer. I can't promise you anything . . . now . . . ."

2. Proceedings Below

Moore moved to suppress the three statements he made in 2011, contending they were involuntary and violated his constitutional rights to due process and against compulsory self-incrimination. Moore argued those confessions were made at a time when he was motivated to change the terms of his confinement, having served only 10 years of an LWOP sentence and having been in solitary confinement for the last two years. Moore asserts he was offered illegal incentives to confess, namely, "an alternative life style in exchange for a guilty plea to a crime which would not affect his sentence."

At the hearing on the motion to suppress, the prosecutor indicated she only intended to introduce his November 6 confession into evidence, not either of the others. Defense counsel argued the detectives tricked him into confessing in the first interview by assuring him they would not use his statements against him, but then threatened him in the second interview with prosecution and the death penalty if he refused to testify against Smyer. However, defense counsel acknowledged to the trial court the detectives told Moore there were no guarantees

about his housing placement and that the prosecutor said she could not make any deals on housing.

Defense counsel also argued the statements made by Moore were unreliable because some statements he made were contrary to known facts, including his claim he shot Crystal and the rival gang member with the same gun. Moreover, Moore was aware of the details of Crystal's murder because he had reviewed all of the police reports and other information about Crystal's murder which had been turned over to his attorney by the prosecution.

The trial court denied Moore's motion, finding the statement was voluntary. It concluded, "I do not find as to the November 6, 2011 statement that there is any police coercion at all." Accordingly, the trial court ruled the November 6 statement was admissible in Moore's trial.

3. Applicable Law

Both the state and federal Constitutions bar the prosecution from introducing a defendant's involuntary confession into evidence at trial. (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) The law governing whether a confession is voluntary is well established. Relying on a long line of cases addressing the issue, the California Supreme Court expressed it this way:

" 'In reviewing the voluntary character of incriminating statements, " '[t]his court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] With respect to the conflicting testimony, the court must "accept that version of events which is most favorable to the People, to the

extent that it is supported by the record." ' [Citations]. "In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] . . . When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness." [Citations.]

" 'A statement is involuntary if it is not the product of " 'a rational intellect and free will.' " [Citation.] The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed.' [Citation.] " 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citations.]"

" 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement

must be causally linked. [Citations.]' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 346–347 (*McWhorter*).)

Likewise, a "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." (*Oregon v. Elstad* (1985) 470 U.S. 298, 307.)

4. The trial court properly denied the motion to exclude.

The trial court admitted only Moore's November 6 confession into evidence. Moore does not contend the November 6 confession violated *Miranda* or that it was otherwise coerced. Indeed, the transcript for the November 6 confession shows Moore expressly waived his *Miranda* rights and was not made any promises by Detective Smith or the deputy district attorney in exchange for his statement. Moore's trial counsel acknowledged at the hearing on the motion to suppress that the deputy district attorney said she could not make any deals on November 6.

Moore nevertheless contends his November 6 confession should have been excluded because it was the product of improper promises made by the detectives in the two previous interviews. Specifically, in the first interview, he contends the detectives improperly promised to move him to a prison in a different state, where he would be safe and released from solitary confinement "to walk a yard without any problems." He also faults Detective Smith's assurance in the second interview that "[t]he death penalty isn't on the table" and Detective Lopez's statement that he would fight a transfer to another prison, like

San Quentin. Moore asserts these implied promises tainted his November 6 confession, rendering it involuntary.

Moore relies on cases, which have held, "where—as a result of improper police conduct—an accused confesses, and subsequently makes another confession, it may be presumed that the subsequent confession is the product of the first because of the psychological or practical disadvantages of having ' "let the cat out of the bag by confessing." ' " (*People v. Sims* (1993) 5 Cal.4th 405, 444–445 (*Sims*)[cases cited within].)

The court in *Sims,* however, went on to explain: "Notwithstanding this presumption, 'no court has ever "gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." " [Citations.] Thus, the foregoing presumption is rebuttable, with the prosecution bearing the burden of establishing a break in the causative chain between the first confession and the subsequent confession. [Citations.]" (*Sims, supra,* 5 Cal.4th at p. 445.)

A court may consider the following factors to determine whether the causative chain was broken: the defendant was given *Miranda* warnings at the start of the subsequent interview, the time between the interviews, the continuity of personnel between the interviews, any attempts to exploit information obtained from the first interview in the subsequent interview, whether the defendant handled himself in a mature and sophisticated fashion, and the defendant's purpose in making his statements in the subsequent interview. (*McWhorter*, *supra,* 47 Cal.4th at p. 361.)

Here, the facts indicate the causative chain was broken between the first two interviews and the November 6 interview. Moore was given *Miranda* warnings before the second and third interviews. Moreover, nearly a month had elapsed between the second and third interview, and almost four months between the first and third. In *McWhorter,* the high court found a week was a sufficient time to attenuate the first interview from the second, as compared to other cases in which mere hours separated the interviews. (*McWhorther, supra,* 47 Cal.4th at pp. 360–361, fn. 14.) Additionally, Moore's maturity and ability to handle himself served to cleanse any taint.

More importantly, the deputy district attorney, who did not attend the first two interviews, created a break in the causative chain between the first two interviews and the third one on November 6. In the first two, which Moore contends were involuntary, Detectives Smith and Lopez discussed an interstate transfer, removal from solitary confinement, and a concurrent sentence rather than the death penalty. Even if we accept that these were improper promises or inducements which overcame Moore's will due to his solitary confinement during an LWOP sentence, the presence of the deputy district attorney on November 6 created the break in the causative chain. In the previous interviews, the detectives had premised their promises on the deputy district attorney's authority. On October 18, for example, they expressly stated they were presenting the deputy district attorney's plan for Moore: he would receive a concurrent sentence, which did not include the death penalty, if he testified against Smyer. When Moore asked about whether he would be sent to another prison, Detective Smith initially responded, "[w]e can talk to the D.A. when we get down there."

Moore could no longer rely on those inducements or promises when, on November 6, the deputy district attorney herself stated more than once that she could not make any promises to him. At the beginning of the November 6 interview, the deputy district attorney told Moore, "I can't make you any deals right now." She also acknowledged he wanted an interstate transfer, but made no promises. At the end of the interview, the deputy district attorney repeated, "I can't promise you anything . . . now . . . ." Moore chose to waive his *Miranda* rights notwithstanding the lack of promises from the person he had been told would decide what inducements he received. On this record, his confession was not coerced.

II. Instructional Issues

Smyer next contends the trial court erred in giving a single set of jury instructions to both juries because the instructions included ones related to confessions or admissions by a codefendant. According to Smyer, these instructions alerted the jury to the fact that Moore had confessed or made an out-of-court statement, from which they could infer that he implicated Smyer.

A. The Challenged Instructions

Smyer challenges six instructions given by the trial court. They are:

CALJIC No. 2.60: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss matter nor permit it to enter into your deliberations in any way."

CALJIC No. 2.61: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a

reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential element."

CALJIC No. 3.11: "You cannot find a defendant guilty based upon the testimony of a co-defendant that incriminates the defendant unless that testimony is corroborated by other evidence which tends to connect that defendant with the commission of the offense. [¶] Testimony by a co-defendant includes any out-of-court statement purportedly made by a co-defendant received for the purpose of proving what the co-defendant stated out of court was true."

CALJIC No. 3.18: "To the extent that a codefendant gives testimony that tends to incriminate another defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case."

CALJIC No. 2.70: "A confession is a statement made by a defendant in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent. [¶] An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part. [¶] Evidence

of an oral confession or an oral admission of the defendant not contained in an audio or video recording and not made in court should be viewed with caution."

CALJIC No. 2.72: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity or degree of the crime may be established by a confession or admission."

B. Smyer Has Forfeited the Issue

Smyer made no objection to the challenged jury instructions. Neither did he ask that his jury's instructions exclude the challenged ones. Smyer has forfeited the issue. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778–779; *People v. Lewis* (2001) 25 Cal.4th 610, 666.)

Smyer argues the error is not forfeited and urges us to review his claim pursuant to section 1259, which permits an appellate court to review a claim of instructional error in the absence of objection at trial if a defendant's substantial rights are affected. In *People v. Christopher* (2006) 137 Cal.App.4th 418, 426, the court explained that cases have equated "substantial rights" with reversible error in which the error resulted in a miscarriage of justice. Smyer has failed to demonstrate prejudicial error, much less one that abridged a substantial right.

In evaluating claims of instructional error, the appellate court reviews the instructions as a whole to assess whether the entire charge delivered a correct interpretation of the law and whether there is a reasonable likelihood the jurors were misled by the challenged instructions. (*Boyde v. California* (1990) 494

U.S. 370, 380; *People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Cross* (2008) 45 Cal.4th 58, 67–68.)

Here, Smyer does not contend the instructions misstated the law. Giving an instruction that is correct as to the law, but irrelevant or inapplicable is generally " 'only a technical error which does not constitute ground for reversal.' " (*People v. Rowland* (1992) 4 Cal.4th 238, 282.) Moreover, CALJIC No. 17.31 instructed the jury to "[d]isregard any instruction which applies to facts determined by you not to exist." We presume Smyer's jury followed this instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Moreover, it is not reasonably likely the jurors were misled by the challenged instructions. This is because Smyer testified at trial and incriminating statements made by him were admitted at trial. At least some of the challenged instructions, CALJIC Nos. 2.70, and 2.72, were applicable to Smyer's own statements and testimony. In particular, R.V. testified Smyer told her he could hire someone to kill a person. Detective Smith also testified Smyer's computer contained information regarding a chat room, which included the question: "I just got some slut pregnant. Now bitch wants my money. What should I do?" These statements can be interpreted as admissions tending to show guilt, to which CALJIC Nos. 2.70 and 2.72 apply. Under these circumstances, it is entirely speculative that the jury would leap to the conclusion that Moore made an admission, confession, or out-of-court statement implicating Smyer simply because it was instructed about the testimony, admission, or confession of a defendant.

III. Prosecutorial Misconduct

Smyer next contends the prosecutor committed misconduct during closing argument because: (1) she argued Moore killed Crystal in exchange for Smyer's loyalty to his gang with no supporting evidence; (2) she improperly attacked Smyer's character; and (3) she improperly vouched for the integrity of the police investigation and Detective Smith's credibility.

Again, Smyer made no objections to the prosecutor's closing arguments at trial. Accordingly, he has likewise forfeited these claims. (*People v. Thornton* (2007) 41 Cal.4th 391, 454 ["defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety."].) To circumvent the forfeiture rule, he claims he received ineffective assistance of counsel as a result of his counsel's failure to object. We reject his attempts to avoid forfeiture.

A. Applicable Law

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) A defendant bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Centeno* (2014) 60 Cal.4th 659, 674.)

On review of a claim of ineffective assistance of counsel, we presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) When the record is silent as to why counsel failed to object, a defendant must show that there was no conceivable tactical purpose for counsel's omission. (*People v. Lewis, supra,* 25 Cal.4th at p. 675.) "[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . . ." (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Indeed, "a mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772.)

B. The Prosecutor Properly Argued There Was An Agreement Between Smyer and Moore

Smyer takes issue with the following statements made by the prosecutor regarding an agreement with Moore: "Moore agreed with Smyer to kill. Moore wanted loyalty. . . . Moore was a 190 East Coast Crips. [¶] He needed recruits. He needed something new. He needed something. Smyer needed something." In rebuttal argument, the prosecutor again argued: "Gangs want loyalty, that's what they look for. They want to suck you in and keep you in, because that's how they become powerful. A gang of one does nothing. A gang of a hundred does a lot."

Smyer argues these statements were improper because there was no evidence to support them. We disagree. "It is settled that a prosecutor is given wide latitude during argument.

The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during a summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) Here, circumstantial evidence supported the argument that an agreement existed between Smyer and Moore. It is within common experience that a person generally does not agree to perform a task for another unless there is payment or other reciprocation. Given that the evidence showed Moore was a member of the 190 East Coast Crips, who claimed Anderson Park as their territory, and Smyer was often at Anderson Park with Moore, the prosecutor could reasonably suggest one reason Moore agreed to kill Crystal was to recruit Smyer to the gang. Thus, Smyer's trial counsel could have chosen not to object to the prosecutor's allegedly improper statements because he understood there was sufficient circumstantial evidence to support the prosecutor's argument.

Alternatively, defense counsel could have made a tactical decision to attack the prosecution's lack of evidence and highlight the prosecutor's own admissions regarding the state of the evidence rather than object to her closing argument. Indeed, one of the first things Smyer's counsel argued in his closing statement was that there was no evidence of an agreement between Smyer and Moore. He asked, "where is the evidence that [Moore] did it on behalf of Mr. Smyer?" He noted the prosecutor's admission that there was no direct evidence of an

agreement. On this record, it is also reasonable to conclude defense counsel's failure to object was a tactical decision.

C. The Prosecutor Properly Referenced Smyer's Poor Character

In addition, Smyer challenges the prosecutor's emphasis on his bad character throughout her closing, contending it violated Evidence Code section 1101, subdivision (b). He claims his counsel's failure to object to the prosecutor's argument constituted ineffective assistance of counsel. We disagree. The prosecutor did not commit misconduct by referencing admissible evidence. Thus, his counsel had no basis to object.

In particular, Smyer challenges the prosecutor's remarks regarding his daughter's testimony that she had a "very, very inconsistent" relationship with him, that he was "very ill tempered" and self-centered, and didn't spend much time with her except on special occasions. The prosecutor used this testimony to rebut the defense's introduction of photographs of Smyer with his daughters. She asked where were the pictures of the everyday events, rather than pictures of birthdays, Christmases, or other special occasions. In keeping with that theme, the prosecutor also suggested a good father would not have changed into his "church clothes" before going to the hospital for the birth of his child.

Neither, the prosecutor argued, would a good father pay only $120 a month in child support while paying $468 per month for a two-seater convertible car. The prosecutor demanded, "How about the college fund? How about a decent house for my kids? No, I want my whip." The prosecutor also questioned where one would put a car seat in a two-seater car.

Smyer also contends the prosecutor attacked his character based on his relationship with R.V., noting R.V. typically paid her own way. She also commented that R.V. never met Smyer's children and was told he only had one child when he actually had two. She asked, "Now if he is such the proud dad, why lie?" The prosecutor further argued Smyer did not call Crystal's family to learn when the funeral was, and did not send flowers or a sympathy card.

The argument challenged by Smyer is not evidence of prior bad acts subject to Evidence Code section 1101, subdivision (b). Traci, her family, R.V., and Smyer himself testified to various aspects of his character. As we discussed above, this testimony was admissible and the prosecutor properly referred to it in her closing argument. Smyer presents no authority that a prosecutor's reference to evidence admitted at trial is improper or that she may not make inferences from that evidence. Instead, it is well established that a prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

D. The Prosecutor Praised the Police Investigation

Next, Smyer contends his counsel should have objected when the prosecutor vouched for Detective Smith during closing arguments. We conclude the prosecutor did not vouch for Detective Smith and thus, there was no basis for an objection.

On rebuttal, the prosecutor argued that there was no need to revisit the crime scene when Detective Smith reopened the case in 2011. The prosecutor asserted, "Detective Smith is a 31-year veteran of the Sheriff's Department. Thirty-one years. To stand up and argue that she doesn't know how to investigate a cold case is all but offensive. Thirty-one years she spent in this

town protecting the lives of the citizens of this county." She further spoke approvingly of Detective Smith's decision to dismiss the case against Moore in 2002 because she acknowledged there was a "missing piece." The prosecutor argued: "You should appreciate that kind of testimony. You should appreciate that kind of law enforcement work. That's what we want our law enforcement personnel to do." The prosecutor characterized this case as representing "the best in law enforcement."

Smyer contends the prosecutor improperly vouched for the police, and Detective Smith in particular, by her comments. Smyer did not vouch for Detective Smith.

" '[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching.' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 337.) Although a prosecutor may not suggest that matters outside the record establish the veracity of a witness, she may assure the jury of a witness's honesty or reliability based on matters in the record. (*People v. Padilla, supra,* 11 Cal.4th at p. 946.) Thus, a prosecutor may not vouch for the credibility of an expert witness by referring to the prosecutor's personal knowledge of the witness and his prior use of the witness (*People v. Turner* (2004) 34 Cal.4th 406, 433), or by intimating the prosecutor had actual knowledge that the officer had never engaged in misconduct (*People v. Woods* (2006) 146 Cal.App.4th 106, 113). Neither is it permissible for the prosecutor to provide personal assurances of a

witness's veracity (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1146–1147).

The prosecutor in this case never suggested she had other evidence, not presented to the jury, to support Detective Smith's credibility or that she personally believed in Detective Smith's testimony. Instead, her argument referred specifically to the evidence and inferences that could be drawn from that evidence. The prosecutor did not vouch for Detective Smith.

IV. There Was No Cumulative Error

Finally, we reject the defendants' claim that the cumulative effect of the purported trial court errors and prosecutorial misconduct rendered their trials unfair and denied them due process.

"Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to defendant absent a combination of errors." (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216.) "A claim of cumulative error is in essence a due process claim and is often presented as such [citation]. 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' [Citation.]" (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.)

With the exception of two sentencing errors, discussed in footnote 6, we have either found no error or harmless error in connection with the defendants' arguments. Reversal is not warranted. (*People v. Burgener* (2003) 29 Cal.4th 833, 884.)

V. The Defendants Forfeited Their Challenge to the Restitution Fine

At sentencing, the trial court imposed a $10,000 restitution fine against each of the defendants pursuant to section 1202.4,

subdivision (b). Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Smyer challenges the imposition of the restitution fine on constitutional grounds, arguing the trial court violated the due process and equal protection clauses as well as the prohibition against cruel and unusual punishment when it imposed the fine without making a determination of his ability to pay. Moore joins in Smyer's challenge. They request we strike the fine or stay it until the People prove they have the ability to pay.

The defendants have forfeited this issue because they failed to object to the imposition of the $10,000 fine at sentencing. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of restitution fine under former section 1202.4 based on inability to pay] (*Avila*).)

Under section 1202.4, subdivision (b), a court must impose a restitution fine in an amount not less than $300 and not more than $10,000 in every case where a person is convicted of a felony unless it finds compelling and extraordinary reasons not to do so. Section 1202.4, subdivision (c), specifies a defendant's inability to pay is not a compelling and extraordinary reason to refuse to impose the fine, but inability to pay "may be considered only in increasing the amount of the restitution fine in excess of the minimum fine [of $300]." While the defendant bears the burden of demonstrating his or her inability to pay, a separate hearing is not required. (§ 1202.4, subd. (d).) Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and demonstrate why it should not be imposed. (*Avila, supra*, 46 Cal.4th at p. 729; see *People v. McMahan* (1992) 3 Cal.App.4th 740, 749–750.)

The defendants concede they failed to object to the restitution fine at sentencing, but assert they did not forfeit the issue for three reasons, all of which pointedly ignore the express terms of section 1202.4.

The defendants first contend the trial court's failure to determine ability to pay constituted a complete failure to exercise its discretion, which is subject to review even absent an objection. This argument is meritless. As discussed above, section 1202.4, subdivision (c), grants the trial court discretion to consider inability to pay if it imposes a fine greater than the minimum. The defendants had the burden to object and demonstrate their inability to pay. They failed to do so. The trial court properly exercised its discretion to impose the maximum fine.

Second, the defendants argue the fine is an unauthorized sentence that is subject to judicial correction at any time. Not so. Section 1202.4, subdivision (b), expressly mandates the imposition of the restitution fine. The fine is not only authorized, it is required. In any event, this issue does not present a pure question of law based on undisputed facts. (*People v. Yeoman, supra,* 31 Cal.4th at p. 118.) Rather, the defendants request a factual determination of their alleged inability to pay without any record of their finances, income, or other pertinent information.

Third, the defendants contend their failure to object at sentencing is excused because the objection would have been futile prior to *Dueñas.* Even prior to *Dueñas,* section 1202.4 required a defendant to object to the amount of the fine and demonstrate his inability to pay anything more than the $300 minimum. Such an objection would not have been futile under governing law at the time of the sentencing hearing. (§ 1202.4, subds. (c)-(d); *Avila, supra*, 46 Cal.4th at p. 729.) The defendants

have presented no reason to excuse their failure to object to the restitution fine at sentencing and have forfeited their challenge to it.

DISPOSITION

The judgment is amended to reflect that the six-year midterm sentences on counts 4 and 5 are imposed and stayed and to reflect the armed enhancement for count 5 is stricken. The trial court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections. The judgments as to Smyer and Moore are otherwise affirmed.

BIGELOW, P.J.

We concur:

STRATTON, J.

WILEY, J.